Filed 6/2/09 Randono v. Gerards CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JAMES R. RANDONO et al., Plaintiffs and Respondents, v. JEAN MARIE GERARDS, Defendant and Appellant.	A122934 (Alameda County Super. Ct. No. RG03081507)

POLLAK, J.—Plaintiffs have moved this court to dismiss the appeal of defendant Jean Marie Gerards from an order dismissing the underlying litigation. Gerards does not object to the dismissal of the action but disputes what she characterizes as an order included in a much earlier ruling of the trial court. The property in dispute in this litigation has been sold and the statement contained in the earlier ruling will have no collateral consequences. Therefore, this appeal is moot and we shall grant plaintiffs' motion and dismiss the appeal.

BACKGROUND

The five plaintiffs and defendant Gerards are siblings who were partners in East 12th Street Partners, the sole asset of which was a warehouse that the siblings inherited from their parents. Plaintiffs brought an action against Gerards for mismanagement of the warehouse and for rent that Gerards allegedly owed for her use of the warehouse.[1]

[1] The complaint is not included in appellant's appendix. These background facts are taken from the motion to dismiss.

On October 25, 2004, the parties appeared before the trial court and placed on the record the terms of a settlement agreement, pursuant to Code of Civil Procedure[2] section 664.6. The settlement appears never to have been memorialized in writing, nor was a judgment entered embodying the terms of the settlement.

One term of the settlement was that "[a] unanimous vote is needed to sell the building before the completion of the upstairs construction, if the partnership agrees to develop the downstairs of the building. The partnership agrees that any vote to sell the building will require a unanimous vote by all parties to sell the building before Jux Beck [a commercial tenant] completes construction on the downstairs. Thereafter, all action by the partnership will be on a majority vote. If Jux Beck does not complete the upstairs project, then the partnership can elect to sell the building upon majority vote." Further, "Mr. Beck will have six months after the partnership approves of plans for the downstairs of the building to obtain permits from the City of Oakland. Thereafter, he must complete construction within two years of having received permits from the City of Oakland, after which time, the partnership may elect to sell the building based upon a majority vote." It was also agreed that Gerards would execute a promissory note to plaintiffs for $180,000, with a potential credit of $20,000 if that amount was recovered from another source.

The court asked, "Are plaintiffs also agreeing to dismiss this action—" Gerards' attorney interrupted and said, "No," and the court finished its question, "with prejudice?" The court then continued, "Okay. So the court is not retaining jurisdiction, and any further action will have to be based on this settlement in a new action, okay?" Both attorneys replied, "Understood." No dismissal was entered at that time.

In October 2005, Gerards made a motion under section 664.6 to enforce the terms of the settlement agreement, which was opposed and, on November 18, 2005, denied. In February 2006, plaintiffs made a motion to enter judgment and to compel Gerards to comply with the settlement terms. Gerards opposed that motion and it was denied on March 17, 2006.

---

[2] All statutory references are to the Code of Civil Procedure section.

On April 3, 2006, plaintiffs made a motion to compel "compliance with sale provision of settlement agreement and request for court to reconsider its order not to enter the parties' settlement agreement as a judgment." The motion alleged that Gerards was preventing the building from being sold "by telling all concerned that the court requires a unanimous vote to sell." On May 19, 2006, the trial court entered the order containing the statement that Gerards challenges in this appeal. The court denied the motion to compel enforcement of the settlement agreement, but stated, "The settlement agreement sets out the process by which the partnership must act. The partnership is now governed by majority vote. The court will not rule prospectively on whether the partnership is acting properly in its fiduciary duty to any individual partner." In her appeal, Gerards challenges the trial court's statement that "[t]he partnership is now governed by majority vote." Gerards questions the jurisdiction of the trial court "to issue an order enforcing only a single provision of a settlement agreement even though the parties had previously dismissed the action, with prejudice. The trial court issued the ruling in question while refusing to enter the settlement agreement as a judgment and also refusing to enforce the other terms of the settlement agreement."

In September 2006, with the authorization of the plaintiffs, who represent the majority interest in the family partnership, the property was sold. Although the partnership apparently distributed to the plaintiffs their respective shares of the proceeds, Gerards' share was retained in escrow and has become the subject of a separate interpleader action. The interpleader action and several other actions between the siblings were consolidated in Alameda County Superior Court (No. RG06265029), in which, following trial, a statement of decision was entered on July 30, 2008, and the judgment is now on appeal to this court (No. A123513). The decision in that consolidated litigation purports to resolve a myriad of conflicting claims between the siblings, their rights with respect to a family trust, and the distribution of the proceeds from the sale of the partnership's warehouse. In accordance with one provision of that decision, the partnership is in the process of dissolution in Nevada.

In July 2008, the plaintiffs filed another motion in this case for an order enforcing the settlement agreement, and specifically Gerards' obligation to pay the reduced amount of $160,000. On July 22, 2008, the trial court denied the motion, observing that it "appears to be an improper and untimely motion for reconsideration of the court's prior orders on this matter dated November 11, 2005, March 17, 2006, and again on May 19, 2006." The order concludes, "This matter is hereby DISMISSED." Gerards has noticed an appeal from this order.

DISCUSSION

Plaintiffs have made a motion to dismiss the appeal, arguing that Gerards has no standing to appeal because she is not an aggrieved party. We asked the parties for further briefing on whether the appeal is moot because the property has been sold. Plaintiffs argue that the appeal is moot because this court can no longer give Gerards control of the property, and because a reversal of the trial court's order would have no practical impact or provide any effectual relief, citing *Prune & A. G. Assn. v. Orchard Co.* (1925) 195 Cal. 264 [dismissing an appeal as moot where the fruit and land at issue had been sold] and *Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 391 ["as a general rule, an appeal presenting only abstract or academic questions is subject to dismissal as moot"]. Plaintiffs further argue that "[t]he partnership is now in the process of winding up under Nevada law. The remaining proceeds from the sale of the warehouse, which represent all the remaining assets of the Partnership, are the subject of [the]litigation" from which the separate appeal is now pending.

Gerards does not dispute any of these facts but argues that the appeal, nonetheless, is not moot. She contends that "the issue on appeal is not whether or not the property should have been sold, but the validity of the order of the trial court that removed the unanimous vote requirement for management" of the property. She contends that the court's statement that the partnership was to be governed by majority vote has a continuing effect because plaintiffs have refused to distribute funds to her from the sale. She argues that "[a] reversal of the subject trial court order would divest [plaintiffs] of their right to conduct the affairs of the partnership in a manner prejudicial to Gerards,

reducing the likelihood of further litigation." In her latest reply letter brief she contends that "the effect of the trial court's order directing all further management of the partnership to be governed by a majority, rather than a unanimous vote of the partners, has permitted the majority partners to manage the affairs of the partnership in an unequal manner, detrimental to the interests of [Gerards]. Such unequal treatment has extended beyond the sale of the property and continues to the present as evidenced by the currently pending . . . litigation" now on appeal.

We are satisfied that the issues presented in the present appeal are in fact moot. The settlement agreement in this action required a unanimous vote for the sale of the building during a limited period following the settlement. The trial court determined that that period had expired and permitted the sole asset of the partnership to be sold with the approval of the majority of the partners, and the building has long been sold to a third party. The partnership is now in the process of dissolution and the rights of Gerards and her siblings to the proceeds of the sale of the partnership property is the subject of the separate proceedings now on appeal. There are no further affairs of the partnership to be managed. The statement that the trial court made in its May 19, 2006 order was not a determination of the respective rights of the parties to the proceeds of sale, or of any other disputed claims. The plaintiffs acknowledge that the statement included in the May 19 order has no significance with respect to the issues involved in the separate proceedings now on appeal. As they point out in urging dismissal of this appeal, "[a]ny party may assert in that action that she or he had the right to act on behalf of the partnership."

Hence, there is no continuing significance to the court's statement. Whether right or wrong or overly broad, the property has been sold and the respective rights of the parties in the proceeds of sale are at issue in separate litigation unaffected by that statement. There is nothing that can be accomplished by proceeding with an appeal in this action.

DISPOSITION

The appeal is dismissed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.